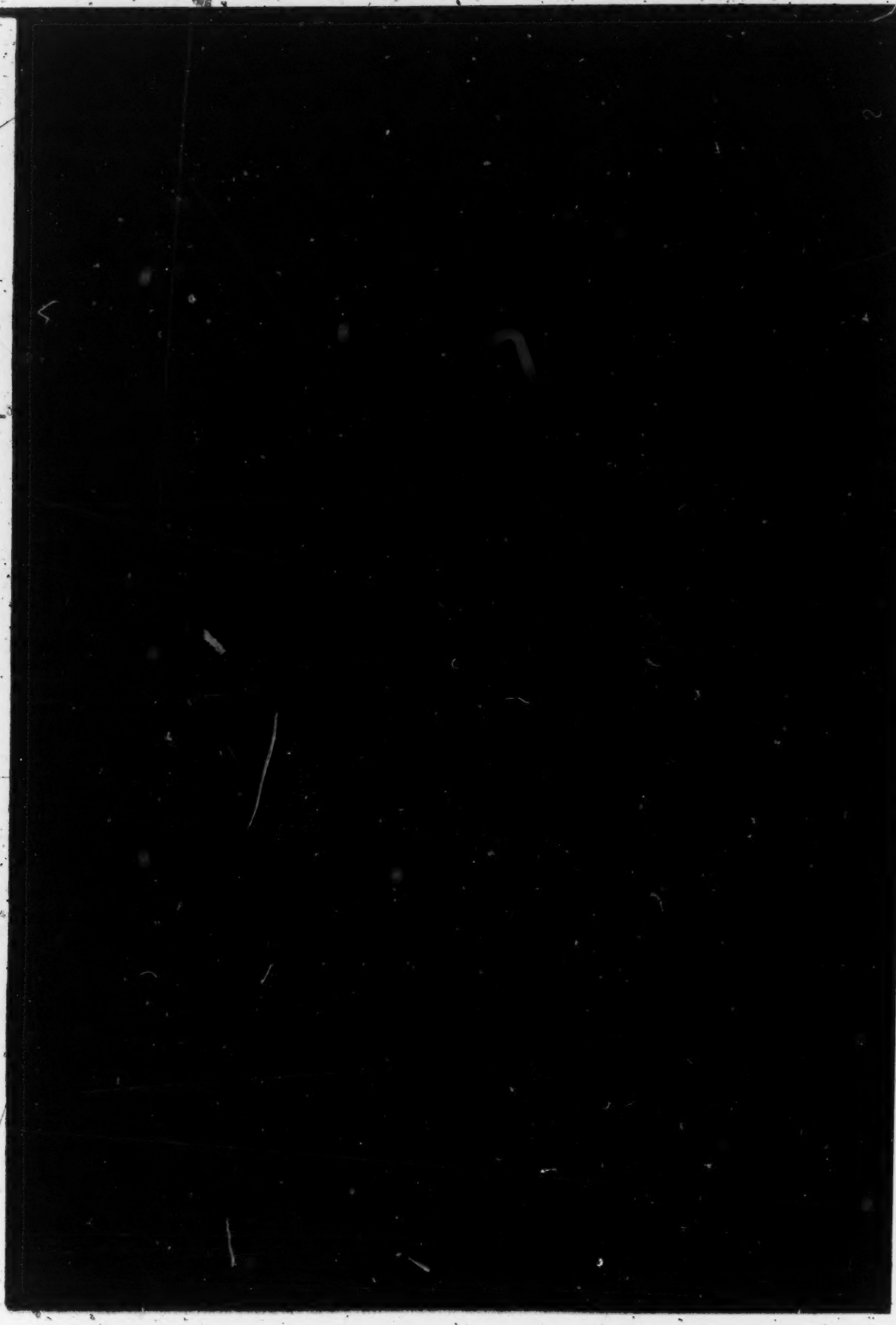

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 384

WALTER GERMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE MOTION FOR REMAND AND VACATION OF JUDGMENT

As set forth in our memorandum in opposition to the granting of the petition for a writ of certiorari in the instant case, petitioner Walter Germann was adjudged in civil contempt in the United States District Court for the Southern District of New York on August 15, 1966, for refusing to return for the purpose of continuing his testimony before a grand jury of that court. He did not receive a retrospective fine for

his past failure to appear; rather, in what was plainly a civil proceeding, he was ordered on August 15, 1966, to appear before the grand jury on or before August 22, or incur a fine of $25,000, plus $1,000 for each day thereafter until he appeared. As the motion to remand itself recognizes (Mot. 2-3), the sole purpose of the order and judgment of civil contempt was to compel petitioner to appear before the grand jury at a later date. Petitioner never complied. By the time of his death on April 10, 1967, a substantial fine had accrued.

The present claim that the judgment is moot is based on the erroneous premise that the fine was imposed as a penalty to punish petitioner for his failure to appear before the grand jury pursuant to the foreman's request (Mot. 3-5). This is not the case. The judgment was not a fine directed at past conduct. The order and judgment of August 15, 1966, had but one purpose: to afford the United States remedial relief by inducing petitioner to appear before the grand jury on or before August 22, 1966, or at as early a date thereafter as the power of the court might achieve.

The instant motion incorrectly assumes that since the contempt adjudication was not compensatory in nature, it must have been a form of penal contempt, with the sanction abating upon the death of the contemnor. This case, however, involves a form of civil contempt adjudication. The use of the civil contempt power to attempt to coerce obedience to court orders is well recognized. See *Shillitani* v. *United States*,

384 U.S. 364; *United States* v. *United Mine Workers of America*, 330 U.S. 258, 303-304; *Penfield Co.* v. *S.E.C.*, 330 U.S. 585, 590. The fact that the conditional fine actually matured upon petitioner's failure to comply with the order does not convert a remedial and coercive sanction into a penal exaction. See *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418, 443; *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Company*, 380 F. 2d 570, 578-579 (C.A.D.C.).

This case aptly illustrates the differences between civil and criminal contempt. The contempt order was specifically designed not to punish, but to apply increasing pressure so that delay would be avoided. Since a grand jury has a limited existence, prompt compliance with its orders to appear is vital; it was solely this objective that the contempt order sought to vindicate. Since the proceedings were instituted for prospective and remedial purposes, they were civil in nature and effect. The authorities previously cited in the government's memorandum in opposition (page 1, note 1) support the view that a fine for civil contempt does not abate upon the death of the contemnor. All of the cases cited by petitioner (Mot. 5) involve criminal fines imposed after criminal convictions and accordingly fall within the settled rule that criminal actions, including collection of criminal fines not already paid, abate upon the death of the defendant.*

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* Petitioner mistakenly suggests (Mot. 6, footnote) that *Crooker* v. *United States*, 325 F. 2d 318, 321 (C.A. 8) overruled the prior Eighth Circuit ruling that a fine in civil

The remedial sanction of a conditional fine designed to enforce future compliance with a civil contempt order of the court to appear before a grand jury is analogous to a bail bond to ensure appearance of a defendant or witness. Once the condition of the bail bond is broken by the failure of the principal to appear, the surety (or the defendant if at large on his own recognizance under a money bond) becomes the absolute debtor of the United States in the amount of the bond. See, *e.g.*, *United States* v. *Mack*, 295 U.S. 480, 486-489; *Tennessee Bonding Co.* v. *United States*, 125 F. 2d 138 (C.A. 6). The fact that the defendant thereafter dies and the criminal proceeding is therefore dismissed does not abate the liability thus accrued. See *Detroit Fidelity & Surety Co.* v. *United States*, 59 F. 2d 565, 568 (C.A. 8), certiorari denied, 287 U.S. 633; cf. *United States* v. *The Stuyvesant Insurance Co.*, 379 F. 2d 277 (C.A. 2), certiorari denied, No. 418, O.T. 1967, October 16, 1967. Similarly, in the instant case, petitioner's civil liability for the amounts accrued prior to his death through his wilful failure to met the conditions of the order of the district court has not abated.

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contempt does not abate upon the death of the contemnor (*Wasserman* v. *United States*, 161 Fed. 722). *Crooker*, like other cases cited by petitioner, involved a criminal fine imposed upon conviction of a crime.

For the foregoing reasons, it is respectfully submitted that the motion to remand with directions to vacate the judgment should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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